

1620095 (Migration) [2019] AATA 400 (17 January 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1620095

MEMBER: Margie Bourke

DATE: 17 January 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 and cl.309.221 of Schedule 2 to the Regulations.

Statement made on 17 January 2019 at 12:34pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) – Subclass 309 (Spouse (Provisional)) – false information – inconsistent information submitted – Tribunal satisfied of visa applicant’s identity – genuine and continuing relationship – lived together for 4 years – knowledge of each other’s lives – statements from family and friends – pooling of financial resources – decision under review remitted for reconsideration

LEGISLATION *Migration Act 1958 (Cth), ss 5F, 65*
Migration Regulations 1994 (Cth), r 1.15A Schedule 2 cls 309.211, 309.221

CASES

He v MIBP[2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 30 September 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 17 June 2015 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied the applicant was in a spousal relationship with the sponsor, and was not satisfied that the applicant's relationship with the sponsor was for anything other than migration purposes.
4. The review applicant appeared before the tribunal on 14 January 2019 to give evidence and present arguments. The tribunal also received oral evidence from the visa applicant via telephone. The hearing was conducted with the assistance of an interpreter in the English and Twi Akan languages.
5. The review applicant was represented in relation to the review by her registered migration agent. The representative attended the tribunal hearing.
6. For the following reasons, the tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The main issue in the present case is whether the visa applicant is the spouse of the review applicant within the meaning of s.5F(2). Initially I will discuss the identity concerns of the delegate recorded in the Department's decision record.
8. **Identity Concerns**
9. It is not disputed that the visa applicant entered Australia in 2009 with a false identity, as part of a [group]. In the Department's decision record dated 30 September 2016, the delegate recorded his "identity concerns" in relation to the visa application which is the subject of this review. A copy of the Department's decision record was provided to the tribunal by the review applicant. The delegate recorded the visa applicant was interviewed in 2016, and recorded he stated he did not have any knowledge of the details of the false identity, and was employed as a [occupation] at the time. The tribunal has not been provided with any documents relating to this interview.
10. The delegate recorded that the visa applicant had applied for a Ghanaian passport under his current name and identity, but had recorded a completely different name of his mother (with the initials [deleted]) on that application, compared with the name of his mother on the partner visa forms. The tribunal has not been provided with any documents relating to this passport application. In all the documents that are available to the tribunal, the visa applicant has consistently recorded his mother's name as [name deleted].

11. The delegate recorded that the applicant had provided a psychological report in which it is recorded that the visa applicant reported he had [several] siblings. In his application form, and other documents, the visa applicant records he has one sibling, a sister. The only psychological report available to the tribunal refers to 'siblings' without specifying a number, and the use of the 's' to denote the plural could so easily be a typographical error, the tribunal will not rely upon it to confirm identity fraud.
12. The tribunal has been provided with the following documents in the name of [applicant's name], the visa applicant, through the review applicant's representative: a Ghanaian passport issued [date] 2017, Electoral Commission Ghana Voter card registered [date] June 2016, National Health Insurance Scheme card issued [date] July 2018, a work reference dated 11 September 2015 in relation to employment of the visa applicant in 2006-2008, a letter dated 14 September 2015 confirming the visa applicant's attendance at school, and some school records of administration and achievement.
13. The tribunal has no documents available to it to indicate that the visa applicant is not [applicant's name] as he claims. The tribunal has been provided with current and previous records in relation to [the applicant], by the review applicant. The tribunal has not been provided with documents referred to by the delegate in the decision record as the basis of his identity concerns.
14. The tribunal has noted the visa applicant provided a birth certificate issued in April 2010 in Ghana, which records it is based on the information of the visa applicant's father. The review applicant gave evidence that the visa applicant has not been able to find his father, and thinks he is deceased. The review applicant gave evidence that the birth certificate was obtained on the information of a friend. The review applicant gave evidence that where the [applicant]'s birth certificate records the informant was [a named person], father, of the person [applicant's name], it is incorrect.
15. The visa applicant gave evidence that he had engaged a friend to obtain the birth certificate on his behalf as he was in Australia in 2010. I have considered that the visa applicant was aware the birth certificate recorded his father as the informant of the information for the birth certificate issued in 2010. The visa applicant gave evidence that the friend met his father, and his father accompanied him to the registry, and his father was recorded as the informant. The visa applicant stated that when he returned to Ghana in 2015, he asked his friend to show him where he met his father, but there is no trace of any family member there now. I have some doubts as to the reliability of the evidence that the visa applicant's father was present at the registry to provide the information for the birth certificate.
16. I have considered the recommendation in the Department's decision record, that if this matter is reviewed, the documents provided to support the claimed relationship and [applicant]'s identity, should be verified. I can only consider the documents provided to the tribunal. These documents consistently record the same information as to the identity of the visa applicant. I do not have the documents the delegate placed weight on, including the passport application, the 2016 interview or notes or recording relating to the interview, or a psychological report that refers to '[several]' siblings. I have considered the oral evidence about the informant for the visa applicant's birth certificate, but have balanced this with the fact the contents of the birth certificate document in so far as they record the visa applicant, his parents and date of birth, are consistent with the other identity documents and information provided to the tribunal.
17. I accept the identity of the visa applicant is [applicant's name], based on the documents provided to the tribunal. I note the visa applicant's Ghanaian passport, Ghanaian electoral Commission card and NHIS card are all photo identity cards and are all current documents. I do not intend to proceed to require the documents to be verified.

Whether the parties are in a spouse or de facto relationship

18. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Based on the certificate of Australian citizenship granted on [date] July 1996, I am satisfied that the review applicant is an Australian citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
19. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

20. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. Based on the registered marriage certificate, I am satisfied that the parties were married in [Suburb 1] on [date] May 2011. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

21. I have considered the oral and written evidence in this matter. I find the review applicant and the visa applicant gave detailed, consistent and credible evidence in the hearing. I accept the parties married on [date] May 2011, and resided together, until the visa applicant left Australia four years later on [date] May 2015. I accept the visa applicant departed Australia after his application for an onshore partner visa was refused.
22. I indicated to the review applicant and her representative at the commencement of the hearing that I accepted that the visa applicant had entered Australia in 2009 with false identity documents, and that he had made claims for [a permanent visa] on the basis he had [undergone an activity], which were not accepted, and [this] visa application was refused. The review applicant indicated that this was the case.
23. I accept the evidence that the parties resided in the review applicant's rented Department of Housing home in [Suburb 1] for the four years they lived together in Australia and that the review applicant still lives in this home. I accept the parties married relatively soon in their relationship, partly because the visa applicant does not believe in sex before marriage, and the parties wished to commence a sexual relationship. I accept the review applicant's daughter resided with the parties until February 2012 when she moved to live on campus at university. I accept the evidence that the review applicant works as a [occupation], and the visa applicant gave evidence of [her work].

24. I accept the parties have no real estate property, but hope to buy a house together in the future. I accept the review applicant owns three cars in her name, her own, her daughter's car because she was on L plates when it was purchased, and the visa applicant's car. I accept the review applicant took out a loan and has completed paying off the loan for the visa applicant's car.
25. I accept the parties had their own individual bank accounts, another joint savings account and a joint bank account. The review applicant's representative provided the tribunal with a copy of the parties' joint bank statements, which she had obtained through an FOI application from the Department, but which were not on the Department file provided to the tribunal. The joint bank statements disclose limited monthly transactions, usually a deposit and some smaller transfers or withdrawals. The review applicant stated the visa applicant wanted the joint account to demonstrate they had a joint account, and to provide back up in emergencies. The joint savings account records it was opened in 2011 but the first substantial deposit was made in April 2015.
26. I accept the parties both worked while they lived together for four years, and were jointly responsible for the bills. Both the review applicant and visa applicant provided detailed evidence of each other's employment, and reasons for change of employment. I accept the evidence that the parties shared the domestic chores, and the review applicant cleaned upstairs in the unit which was essentially the bedrooms, and the visa applicant cleaned the living areas downstairs. I accept the evidence that both parties cooked their meals, the visa applicant cooked Ghanaian type spicy meals, and the review applicant cooked more bland [cuisine].
27. The visa applicant told the tribunal hearing, and the review applicant stated he had told her, he has been unable to contact his parents and sister, and he thinks they are deceased. There is no evidence from relatives of the visa applicant in support of the application. There is no evidence confirming the visa applicant has officially sought to trace his parents and his sister, as the visa applicant stated a police officer on the road had advised him too much time had passed.
28. The parties provided nine statutory declarations from friends and family members in support of the application for the visa. The documents vary in detail and content, and how the deponent knows the parties. The documents are evidence that the parties represent themselves to others as being in a committed relationship, as being married to each other, and that friends and relatives believe the marriage is a genuine relationship.
29. The parties gave evidence of each other's religious beliefs, and the support they have provided to each other. The visa applicant gave evidence of the review applicant's [operation] in 2014. Both parties expressed their distress at their separation, and the methods they use to provide each other with support. The parties gave evidence of their regular and constant communication.
30. The evidence before the tribunal is that the parties have been married for seven and a half years, and lived together for four years. The parties both stated they hoped to foster or adopt a child together, and hoped to be able to afford to buy a house together in the future.
31. The review applicant stated she had not travelled to Ghana for health reasons. They had not applied for a visitor visa for the visa applicant as they had been advised against it.
32. I have considered the oral and written evidence provided to the tribunal, and the written evidence provided to the Department. Based on the information and evidence available to me, I make the following findings.

33. The parties do not have joint ownership of real estate or major investments, and do not have any joint liabilities. The review applicant owns three cars, and one vehicle is described as the visa applicant's car, and currently worth an estimated \$10,000. The review applicant took out a loan, and paid it off to purchase this car for the visa applicant, but this was not a legal obligation in respect of the visa applicant, it was her own obligation. The parties have a current joint savings account, and operated a joint bank account with limited transactions when the visa applicant lived in Australia with the review applicant from May 2011 to May 2015. The parties shared household expenses and household bills from May 2011 to May 2015. The parties pool their financial resources as evidenced by their joint savings account, and the review applicant buying the car and paying the loan for the visa applicant. The parties had shared day-to-day household expenses for a period of four years at the time of application.
34. The parties do not have joint responsibility for the care or support of children, although the review applicant's daughter resided with them from May 2011 until February 2012. The parties managed a household and lived together for four years from [date] May 2011 until [date] May 2015. The parties shared the responsibility for the housework, including cooking and cleaning while they shared the household for four years.
35. The parties have represented themselves to friends, family and church goers as being in a married relationship. The opinion of friends and relatives of the parties in Australia is that their relationship is genuine and committed. I have noted there is no evidence from relatives of the visa applicant, or from friends of the visa applicant in Ghana about the relationship. The parties socialised together, going to the movies or festivals when the visa applicant was in Australia, but currently they plan their social activities around their communication.
36. The parties have been married for seven and a half years, and lived together for four years. The parties provide emotional support and companionship to each other, and particularly during the period of separation since [date] May 2015, have communicated often and regularly to provide emotional support to each other. The parties see the relationship as long term and plan to foster or adopt a child, and hope to save enough to purchase a house.
37. I have considered the circumstances of the relationship, as outlined in r.1.15A(3), as discussed above. Based on evidence of the circumstances of the relationship, I am satisfied that at the time of application, and at the time of decision, the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others, and the parties were in a genuine and continuing relationship, and the parties lived together, and not separately and apart, on a permanent basis. For these reasons, I am satisfied that the visa applicant is the spouse of the review applicant within the meaning of s.5F(2)(b)-(d).
38. On the basis of the above the tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
39. Therefore the visa applicant meets the requirements of cl.309.211 and cl.309.221.
40. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

41.

42.

DECISION

43. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 and cl.309.221 of Schedule 2 to the Regulations.

Margie Bourke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).